or other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a "determination of the threshold level that State action must attain in order to create rights under the Equal Protection Clause." A study of the language in the indictment clearly shows that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows.

The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother BRENNAN, however, says that the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to § 241. Some of his language further suggests that the Court indicates *sub silentio* that Congress does not have the power to outlaw such conspiracies. Although the Court specifically rejects any such connotation, *ante*, p. ——, it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1965.

United States, Appellant, *v.* Herbert Guest et al.	On Appeal From the United States District Court for the Middle District of Georgia.

[March 28, 1966.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I join Parts I and II [1] of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that 18 U. S. C. § 241 (1964 ed.) reaches conspiracies, embracing only the action of private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent. On the other hand, I agree that § 241 does embrace state interference with such interstate travel, and I therefore consider that this aspect of the indictment is sustainable on the reasoning of Part II of the Court's opinion.

This right to travel must be found in the Constitution itself. This is so because § 241 covers only conspiracies to interfere with any citizen in the "free exercise or enjoyment" of a right or privilege "secured to him by the Constitution or laws of the United States," and no "right to travel" can be found in § 241 or in any other law of the United States. My disagreement with this phase of the Court's opinion lies in this: While past cases do indeed establish that there is a constitutional "right to travel" between States free from unreasonable *govern-*

[1] The action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary.

mental interference, today's decision is the first to hold that such movement is also protected against *private* interference, and, depending on the constitutional source of the right, I think it either unwise or impermissible so to read the Constitution.

Preliminarily, nothing in the Constitution expressly secures the right to travel. In contrast the Articles of Confederation provided in Art. IV:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ."

This right to "free ingress and regress" was eliminated from the draft of the Constitution without discussion even though the main objective of the Convention was to create a stronger union. It has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution. See *United States* v. *Wheeler*, 254 U. S. 281, 294. I propose to examine the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source.

I.

Because of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution. In the influential

opinion of Mr. Justice Washington on circuit, *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (1825), the court addressed itself to the question—"what are the privileges and immunities of citizens in the several states?" *Id.*, at 380. *Corfield* was concerned with a New Jersey statute restricting to state citizens the right to rake for oysters, a statute which the court upheld. In analyzing the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, the court stated that it confined "these expressions to those privileges and immunities which are, in their nature, *fundamental*," and listed among them "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ." *Id.*, at 380–381.

The dictum in *Corfield* was cited with approval in the first opinion of this Court to deal directly with the right of free movement, *Crandall* v. *Nevada*, 6 Wall. 35, which struck down a Nevada statute taxing persons leaving the State. It is first noteworthy that in his concurring opinion Mr. Justice Clifford asserted that he would hold the statute void exclusively on commerce grounds for he was clear "that the State legislature cannot impose any such burden upon commerce among the several States." 6 Wall., at 49. The majority opinion of Mr. Justice Miller, however, eschewed reliance on the Commerce Clause and the Import-Export Clause and looked rather to the nature of the federal union:

> "The people of these United States constitute one nation. . . . This government has necessarily a capital established by law . . . . That government has a right to call to this point any or all of its citizens to aid in its service . . . . The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the inte-

> rior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established." 6 Wall., at 43–44.

Accompanying this need of the Federal Government, the Court found a correlative right of the citizen to move unimpeded throughout the land:

> "He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 6 Wall., at 44.

The focus of that opinion, very clearly, was thus on impediments by the States on free movement by citizens. This is emphasized subsequently when Mr. Justice Miller asserts that this approach is "neither novel nor unsupported by authority," because it is, fundamentally, a question of the exercise of a State's taxing power to obstruct the functions of the Federal Government: "[T]he right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied." 6 Wall., at 44–45.

Later cases, alluding to privileges and immunities, have in dicta included the right to free movement. See *Paul* v. *Virginia*, 8 Wall. 168, 180; *Williams* v. *Fears*, 179 U. S. 270, 274; *Twining* v. *New Jersey*, 211 U. S. 78.

Although the right to travel thus has respectable precedent to support its status as a privilege and immunity of national citizenship, it is important to note that those cases all dealt with the right of travel simply as affected by oppressive *state* action. Only one prior case in this Court, *United States* v. *Wheeler*, 254 U. S. 281, was argued precisely in terms of a right to free movement as against interference by private individuals. There the Government alleged a conspiracy under the predecessor of § 241 against the perpetrators of the notorious Bisbee Deportations.[2] The case was argued straightforwardly in terms of whether the right to free ingress and egress, admitted by both parties to be a right of national citizenship, was constitutionally guaranteed against private conspiracies. The Brief for the Defendants in Error, whose counsel was Charles Evans Hughes, later Chief Justice of the United States, gives as one of its main points: "So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of the States themselves and of those acting under their authority." Brief, at p. i. The Court, with one dissent, accepted this interpretation of the right of unrestricted interstate movement, observing that *Crandall* v. *Nevada*, *supra*, was inapplicable because, *inter alia*, it dealt with state action. 254 U. S., at 299. More recent cases discussing or applying the right to interstate travel have always been in the context of

[2] For a discussion of the deportations, see The President's Mediation Comm'n, Report on the Bisbee Deportations (November 6, 1917).

oppressive state action. See, *e. g.*, *Edwards* v. *California*, 314 U. S. 160, and other cases discussed, *infra*.[3]

It is accordingly apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held not to encompass such a right.

II.

A second possible constitutional basis for the right to move among the States without interference is the Commerce Clause. When Mr. Justice Washington articulated the right in *Corfield*, it was in the context of a state statute impeding economic activity by outsiders, and he cast his statement in economic terms. 4 Wash. C. C., at 380–381. The two concurring Justices in *Crandall* v. *Nevada*, *supra*, rested solely on the commerce argument, indicating again the close connection between freedom of commerce and travel as principles of our federal union. In *Edwards* v. *California*, 314 U. S. 160, the Court held squarely that the right to unimpeded movement of persons is guaranteed against oppressive state legislation by the Commerce Clause, and declared unconstitutional a California statute restricting the entry of indigents into that State.

Application of the Commerce Clause to this area has the advantage of supplying a longer tradition of case-law

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[3] The Court's reliance on *United States* v. *Moore*, 129 F. 630, is misplaced. That case held only that it was not a privilege or immunity to organize labor unions. The reference to "the right to pass from one state to any other" was purely incidental dictum.

and more refined principals of adjudication. States do have rights of taxation and quarantine, see *Edwards* v. *California*, 314 U. S., at 184 (concurring opinion), which must be weighed against the general right of free movement, and Commerce Clause adjudication has traditionally been the means of reconciling these interests. Yet this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, not—with an exception to be dealt with in a moment—with private interference.

The case of *In re Debs*, 158 U. S. 564, may be thought to raise some doubts as to this proposition. There the United States sought to enjoin Debs and members of his union from continuing to obstruct—by means of a strike—interstate commerce and the passage of the mails. The Court held that Congress and the Executive could certainly act to keep the channels of interstate commerce open, and that a court of equity had no less power to enjoin what amounted to a public nuisance. It might be argued that to the extent *Debs* permits the Federal Government to obtain an injunction against the private conspiracy alleged in the present indictment,[4] the criminal statute should be applicable as well on the ground that the governmental interest in both cases is the same, namely to vindicate the underlying policy of the Commerce Clause. However, § 241 is not directed toward the vindication of governmental interests; it requires a private right under federal law. No such right can be found in *Debs*, which stands simply for the proposition that the Commerce Clause gives the Federal Govern-

[4] It is not even clear that an equity court would enjoin a conspiracy of the kind alleged here, for traditionally equity will not enjoin a crime. See Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1013–1018 (1965).

ment standing to sue on a basis similar to that of private individuals under nuisance law. The substantive rights of private persons to enjoin such impediments, of course, devolve from state not federal law; any seemingly inconsistent discussion in *Debs* would appear substantially vitiated by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference. And the Court's opinion here makes no such suggestion.

III.

One other possible source for the right to travel should be mentioned. Professor Chafee, in his thoughtful study, "Freedom of Movement," [5] finds both the privileges and immunities approach and the Commerce Clause approach unsatisfactory. After a thorough review of the history and cases dealing with the question he concludes that this "valuable human right," *id.*, at 209, is best seen in due process terms:

> "Already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment. . . . Thus the 'liberty' of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement." *Id.*, at 192–193.

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[5] In Three Human Rights in the Constitution of 1787, at 162 (1956).

This due process approach to the right to unimpeded movement has been endorsed by this Court. In *Kent* v. *Dulles*, 357 U. S. 116, the Court asserted that "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," *id.*, at 125, citing *Crandall* v. *Nevada*, *supra*, and *Edwards* v. *California*, *supra*. It is true that the holding in that case turned essentially on statutory grounds. However, in *Aptheker* v. *Secretary of State*, 378 U. S. 500, the Court, applying this constitutional doctrine, struck down a federal statute forbidding members of Communist organizations to obtain passports. Both the majority and dissenting opinions affirmed the principle that the right to travel is an aspect of the liberty guaranteed by the Due Process Clause.

Viewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to governmental action.

IV.

This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against governmental impediments. The right involved being as nebulous as it is, however, it is necessary to consider it in terms of policy as well as precedent.

As a general proposition it seems to me very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority,

not other individuals. It is true that there are a very narrow range of rights against individuals which have been read into the Constitution. In *Ex parte Yarbrough*, 110 U. S. 651, the Court held that implicit in the Constitution is the right of citizens to be free of private interference in federal elections. *United States* v. *Classic*, 313 U. S. 299, extended this coverage to primaries. *Logan* v. *United States*, 144 U. S. 263, applied the predecessor of § 241 to a conspiracy to injure someone in the custody of a United States marshal; the case has been read as dealing with a privilege and immunity of citizenship, but it would seem to have depended as well on extrapolations from statutory provisions providing for supervision of prisoners. The Court in *In re Quarles*, 158 U. S. 532, extending *Logan*, *supra*, declared that there was a right of federal citizenship to inform federal officials of violations of federal law. See also *United States* v. *Cruikshank*, 92 U. S. 542, 552, which announced in dicta a federal right to assemble to petition the Congress for a redress of grievances.

Whatever the validity of these cases on their own terms, they are hardly persuasive authorities for adding to the collection of privileges and immunities the right to be free of private impediments to travel. The cases just discussed are narrow, and are essentially concerned with the vindication of important relationships with the Federal Government—voting in federal elections, involvement in federal law enforcement, communicating with the Federal Government. The present case stands on a considerably different footing.

It is arguable that the same considerations which led the Court on numerous occasions to find a right of free movement against oppressive state action now justifies a similar result with respect to private impediments. *Crandall* v. *Nevada*, *supra*, spoke of the need to travel to the capital, to serve and consult with the offices of government. A basic reason for the formation of this

Nation was to facilitate commercial intercourse; intellectual, cultural, scientific, social, and political interests are likewise served by free movement. Surely these interests can be impeded by private vigilantes as well as by state action. Although this argument is not without force, I do not think it is particularly persuasive. There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate federal legislation.

To decline to find a constitutional right of the nature asserted here does not render the Federal Government helpless. As to interstate commerce by railroads, federal law already provides remedies for "undue or unreasonable prejudice," 24 Stat. 380, as amended, 49 U. S. C. § 3 (1) (1964 ed.), which has been held to apply to racial discrimination. *Henderson* v. *United States*, 339 U. S. 816. A similar statute applies to motor carriers, 49 Stat. 558, as amended, 49 U. S. C. § 316 (d) (1964 ed.), and to air carriers, 72 Stat. 760, 49 U. S. C. § 1374 (b) (1964 ed.). See *Boynton* v. *Virginia*, 364 U. S. 454; *Fitzgerald* v. *Pan American World Airways*, 229 F. 2d 499. The Civil Rights Act of 1964, 78 Stat. 243, deals with other types of obstructions on interstate commerce. Indeed, under the Court's present holding, it is arguable that any conspiracy to discriminate in public accommodations having the effect of impeding interstate commerce could be reached under § 241, unaided by Title II of the Civil Rights Act of 1964. Because Congress has wide authority to legislate in this area, it seems unnecessary—if prudential grounds are of any relevance, see *Baker* v. *Carr*, 369 U. S. 186, 258–259 (CLARK, J., concurring)—to strain to find a dubious constitutional right.

V.

If I have succeeded in showing anything in this constitutional exercise, it is that until today there was no federal right to be free from private interference with interstate transit, and very little reason for creating one. Although the Court has ostensibly only "discovered" this private right in the Constitution and then applied § 241 mechanically to punish those who conspire to threaten it, it should be recognized that what the Court has in effect done is to use this all-encompassing criminal statute to fashion federal common-law crimes, forbidden to the federal judiciary since the 1812 decision in *United States* v. *Hudson*, 7 Cranch 32. My Brother DOUGLAS, dissenting in *United States* v. *Classic*, *supra*, noted well the dangers of the indiscriminate application of the predecessor of § 241: "It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive." 313 U. S., at 331–332.

I do not gainsay that the immunities and commerce provisions of the Constitution leave the way open for the finding of this "private" constitutional right, since they do not speak solely in terms of governmental action. Nevertheless, I think it wrong to sustain a criminal indictment on such an uncertain ground. To do so subjects § 241 to serious challenge on the score of vagueness and serves in effect to place this Court in the position of making criminal law under the name of constitutional interpretation. It is difficult to subdue misgivings about the potentialities of this decision.

I would sustain this aspect of the indictment only on the premise that it sufficiently alleges state interference with interstate travel, and on no other ground.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1965.

United States, Appellant, *v.* Herbert Guest et al.	On Appeal From the United States District Court for the Middle District of Georgia.

[March 28, 1966.]

Mr. Justice Brennan, with whom The Chief Justice and Mr. Justice Douglas join, concurring in part and dissenting in part.

I join Part I of the Court's opinion. I reach the same result as the Court on that branch of the indictment discussed in Part III of its opinion but for other reasons. See footnote 3, *infra*. And I agree with so much of Part II (page 6 to the top of page 8) as construes 18 U. S. C. § 241 to encompass conspiracies to injure, oppress, threaten or intimidate citizens in the free exercise or enjoyment of Fourteenth Amendment rights and holds that, as so construed, § 241 is not void for indefiniteness. I do not agree, however, with the remainder of Part II (page 8 to the top of page 11), which holds, as I read the opinion, that a conspiracy to interfere with the exercise of the right to equal utilization of state facilities is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a "right . . . secured . . . by the Constitution" unless discriminatory conduct by state officers is involved in the alleged conspiracy.

I.

The second numbered paragraph of the indictment charges that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of "[t]he right to equal utilization, without discrimination upon the basis of race,

of public facilities . . . owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof." Appellees contend that as a matter of statutory construction § 241 does not reach such a conspiracy. They argue that a private conspiracy to interfere with the exercise of the right to equal utilization of the state facilities described in that paragraph is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a right "secured" by the Fourteenth Amendment because "there exist no Equal Protection Clause rights against wholly private action."

The Court deals with this contention by seizing upon an allegation in the indictment concerning one of the means employed by the defendants to achieve the object of the conspiracy. The indictment alleges that the object of the conspiracy was to be achieved, in part, "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts . . . ." The Court reads this allegation as "broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficiently to constitute a denial of rights protected by the Equal Protection Clause," and the Court holds that this allegation, so construed, is sufficient to "prevent dismissal of this branch of the indictment." [1] I understand this to mean

[1] As I read the indictment, the allegation regarding the false arrests relates to all the other paragraphs and not merely, as the Court suggests, to the second numbered paragraph of the indictment. See n. 1 in the Court's opinion. Hence, assuming that, as maintained by the Court, the allegation could be construed to encompass discriminatory conduct by state law enforcement officers, it would be a sufficient basis for preventing the dismissal of each of the other paragraphs of the indictment. The right to be free from discriminatory conduct by law enforcement officers while using privately owned places of public accommodation (paragraph one) or while traveling from State to State (paragraphs three and four), or while doing any-

that, no matter how compelling the proofs that private conspirators murdered, assaulted, or intimidated Negroes in order to prevent their use of state facilities, the prosecution under the second numbered paragraph must fail in the absence of proofs of active connivance of law enforcement officers with the private conspirators in causing the false arrests.

Hence, while the order dismissing the second numbered paragraph of the indictment is reversed, severe limitations on the prosecution of that branch of the indictment are implicitly imposed. These limitations could only stem from an acceptance of appellees' contention that, because there exist no Equal Protection Clause rights against wholly private action, a conspiracy of private persons to interfere with the right to equal utilization of state facilities described in the second numbered paragraph is not a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241. In other words, in the Court's view the only right referred to in the second numbered paragraph that is, for purposes of § 241, "secured . . . by the Constitution" is a right to be free—when seeking access to state facilities—from discriminatory conduct by state officers or by persons acting in concert with state officers.[2]

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thing else, is unquestionably secured by the Equal Protection Clause. It would therefore be unnecessary to decide whether the right to travel from State to State is itself a right secured by the Constitution or whether paragraph one is defective either because of the absence of an allegation of a racial discriminatory motive or because of the exclusive remedy provision of Civil Rights Act of 1964, § 207 (b), 78 Stat. 245, 42 U. S. C. § 2000a–6 (b) (1964 ed.).

[2] I see no basis for a reading more consistent with my own view in the isolated statement in the Court's opinion that "the rights under the Equal Protection Clause described by this paragraph [two] of the indictment have been . . . firmly and precisely established by a consistent line of decisions in this Court. . . ."

I cannot agree with that construction of § 241. I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities described in the second numbered paragraph of the indictment is a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241—without regard to whether state officers participated in the alleged conspiracy. I believe that § 241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because § 241, as an exercise of congressional power under § 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a "right . . . secured . . . by the Constitution" and because the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution" within the meaning of that phrase as used in § 241.[3]

My difference with the Court stems from its construction of the term "secured" as used in § 241 in the phrase "a right . . . secured . . . by the Constitution or laws of the United States." The Court tacitly construes the term "secured" so as to restrict the coverage of § 241 to those rights that are "fully protected" by the Constitution or another federal law. Unless private interferences with the exercise of the right in question are prohibited by the Constitution itself or another federal law, the right cannot, in the Court's view, be deemed "secured . . . by the Constitution or laws of the United States" so as to make § 241 applicable to a private conspiracy to interfere with the exercise of that right. The Court then

[3] Similarly, I believe that § 241 reaches a private conspiracy to interfere with the right to travel from State to State. I therefore need not reach the question whether the Constitution of its own force prohibits private interferences with that right; for I construe § 241 to prohibit such interferences, and as so construed I am of the opinion that § 241 is a valid exercise of congressional power.

premises that neither the Fourteenth Amendment nor any other federal law[4] prohibits private interferences with the exercise of the right to equal utilization of state facilities.

In my view, however, a right can be deemed "secured . . . by the Constitution or laws of the United States," within the meaning of § 241, even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself (or another federal law). The term "secured" means "created by, arising under or dependent upon," *Logan* v. *United States*, 144 U. S. 263, 293, rather than "fully protected." A right is "secured . . . by the Constitution" within the meaning of § 241 if it emanates from the Constitution, if it finds its source in the Constitution. Section 241 must thus be viewed, in this context, as an exercise of congressional power to amplify prohibitions of the Constitution addressed, as is invariably the case, to government officers; contrary to the view of the Court, I

[4] This premise is questionable. Title III of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. § 2000b (1964 ed.) authorizes the Attorney General on complaint from an individual that he is "being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision," to commence a civil action "for such relief as may be appropriate" and against such parties as are "necessary to the grant of effective relief." Arguably this would authorize relief against private parties not acting in concert with state officers. (This title of the Act does not have an exclusive remedy similar to § 207 (b) of Title II, 42 U. S. C. § 2000a–6 (b).)

The Court affirmatively disclaims any intention to deal with Title III of the Civil Rights Act of 1964 in connection with the second numbered paragraph of the indictment. But, as the District Judge observed in his opinion, the Government maintained that the right described in that paragraph was "secured" by the Fourteenth Amendment and, "additionally," by Title III of the Civil Rights Act of 1964. 246 F. Supp., at 484. That position was not effectively abandoned in this Court.

think we are dealing here with a statute that seeks to implement the Constitution, not with the "bare terms" of the Constitution. Section 241 is not confined to protecting rights against private conspiracies that the Constitution or another federal law also protects against private interferences. No such duplicative function was envisioned in its enactment. See Appendix in *United States* v. *Price, ante.* Nor has this Court construed § 241 in such a restrictive manner in other contexts. Many of the rights that have been held to be encompassed within § 241 are not additionally the subject of protection of specific federal legislation or of any provision of the Constitution addressed to private individuals. For example, the prohibitions and remedies of § 241 have been declared to apply, without regard to whether the alleged violator was a government officer, to interferences with the right to vote in a federal election, *Ex parte Yarbrough,* 110 U. S. 651, or primary, *United States* v. *Classic,* 313 U. S. 299; the right to discuss public affairs or petition for redress of grievances, *United States* v. *Cruikshank,* 92 U. S. 542, 552, cf. *Hague* v. *CIO,* 307 U. S. 496, 512–513 (opinion of Roberts, J.); *Collins* v. *Hardyman,* 341 U. S. 651, 663 (dissenting opinion); the right to be protected against violence while in the lawful custody of a federal officer, *Logan* v. *United States,* 144 U. S. 263; and the right to inform of violations of federal law, *In re Quarles and Butler,* 158 U. S. 532. The full import of our decision in *United States* v. *Price, ante,* is to treat the rights purportedly arising from the Fourteenth Amendment in parity with those rights just enumerated, arising from other constitutional provisions. The reach of § 241 should not vary with the particular constitutional provision that is the source of the right. For purposes of applying § 241 to a private conspiracy, the standard used to determine whether, for example, the right to discuss public affairs or the right to vote in a

federal election is a "right . . . secured . . . by the Constitution" is the very same standard to be used to determine whether the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution."

For me, the right to use state facilities without discrimination on the basis of race is, within the meaning of § 241, a right created by, arising under and dependent upon the Fourteenth Amendment and hence is a right "secured" by that Amendment. It finds its source in that Amendment. As recognized in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights . . . ." The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command. Cf. *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C. A. 8th Cir. 1956). Whatever may the status of the right to equal utilization of *privately owned facilities*, see generally *Bell* v. *Maryland*, 378 U. S. 226, it must be emphasized that we are here concerned with the right to equal utilization of *public facilities owned or operated by or on behalf of the State*. To deny the existence of this right or its constitutional stature is to deny the history of the last decade, or to ignore the role of federal power, predicated on the Fourteenth Amendment, in obtaining nondiscriminatory access to such facilities. It is to do violence to the common understanding, an understanding that found expression in Titles III and IV of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. §§ 2000b, 2000c (1964 ed.), dealing with state facilities. Those provi-

sions reflect the view that the Fourteenth Amendment creates the right to equal utilization of state facilities. Congress did not preface those titles with a provision comparable to that in Title II [5] explicitly creating the right to equal utilization of certain privately owned facilities; Congress rightly assumed that a specific legislative declaration of the right was unnecessary, that the right arose from the Fourteenth Amendment itself.

In reversing the District Court's dismissal of the second numbered paragraph, I would therefore hold that proof at the trial of the conspiracy charged to the defendants in that paragraph will establish a violation of § 241 without regard to whether there are also proofs that state law enforcement officers actively connived in causing the arrests of Negroes by means of false reports.

II.

My view as to the scope of § 241 requires that I reach the question of constitutional power—whether § 241 or legislation indubitably designed to punish entirely private conspiracies to interfere with the exercise of Fourteenth Amendment rights constitutes a permissible exercise of the power granted to Congress by § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of" the Amendment.

A majority of the members of the Court [6] express the view today that § 5 empowers Congress to enact laws

[5] "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U. S. C. § 2000a (a) (1964 ed.).

[6] The majority consists of the Justices joining my Brother CLARK's opinion and the Justices joining this opinion. The opinion of MR. JUSTICE STEWART construes § 241 as applied to the second numbered paragraph to require proof of active participation by state officers

punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. It made that determination in enacting § 241, see the Appendix in *United States* v. *Price, ante,* and, therefore § 241 is constitutional legislation as applied to reach the private conspiracy alleged in the second numbered paragraph of the indictment.

I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases,* 109 U. S. 3, 11, have declared that Congress' power under § 5 is confined to the adoption of "appropriate legislation for correcting the effects of . . . prohibited State laws, and State acts, and thus to render them effectually null, void, and innocuous." I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary;[7] and it

in the alleged conspiracy and that opinion does not purport to deal with this question.

[7] Congress, not the judiciary, was viewed as the more likely agency to implement fully the guarantees of equality, and thus it could be presumed the primary purpose of the Amendments was to augment

attributes a far too limited objective to the Amendment's sponsors.[8] Moreover, the language of § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment are virtually the same, and we recently held in *South Carolina* v. *Katzenbach*, 383 U. S. —, —, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." The classic formulation of that test by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, was there adopted:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

It seems to me that this is also the standard that defines the scope of congressional authority under § 5 of the Fourteenth Amendment. Indeed, *South Carolina* v. *Katzenbach* approvingly refers to *Ex parte Virginia*, 100 U. S. 339, 345–346, a case involving the exercise of the congressional power under § 5 of the Fourteenth

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the power of Congress, not the judiciary. See James, The Framing of the Fourteenth Amendment, 184 (1956); Harris, The Quest for Equality, 53–54 (1960); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356 (1964).

[8] As the first Mr. Justice Harlan said in dissent in the *Civil Rights Cases*, 109 U. S., at 54: "It was perfectly well known that the great danger to equal enjoyment by citizens of the rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [§ 5], to clothe Congress with power and authority to meet that danger." See *United States* v. *Price*, *ante*, p. —, and Appendix.

Amendment, as adopting the *McCulloch* v. *Maryland* formulation for "each of the Civil War Amendments."

Viewed in its proper perspective, § 5 appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities.[9] And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—neither state officers nor acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.[10]

III.

Section 241 is certainly not model legislation for punishing private conspiracies to interfere with the exercise of the right of equal utilization of state facilities.

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[9] *United States* v. *Price*, *ante*. See *Screws* v. *United States*, 325 U. S. 91; *Williams* v. *United States*, 341 U. S. 97; *Monroe* v. *Pape*, 365 U. S. 167.

[10] Cf. *Atlanta Motel* v. *United States*, 379 U. S. 241, 258, applying the settled principle expressed in *United States* v. *Darby*, 312 U. S. 100, 118, that the power of Congress over interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ."

It deals in only general language "with Federal rights and with all Federal rights" and protects them "in the lump," *United States* v. *Mosely*, 238 U. S. 383, 387; it protects in most general terms "any right or privilege secured . . . by the Constitution or laws of the United States." Congress has left it to the courts to mark the bounds of those words, to determine on a case-by-case basis whether the right purportedly threatened is a federal right. That determination may occur after the conduct charged has taken place or it may not have been anticipated in prior decisions; "a penumbra of rights may be involved, which none can know until decision has been made and infraction may occur before it is had." [11] Reliance on such wording plainly brings § 241 close to the danger line of being void for vagueness.

But, as the Court holds, a stringent scienter requirement saves § 241 from condemnation as a criminal statute failing to provide adequate notice of the proscribed conduct.[12] The gravamen of the offense is conspiracy, and therefore, like a statute making certain conduct criminal only if it is done "willfully," § 241 requires proof of a specific intent for conviction. We have construed § 241 to require proof that the persons charged conspired to act in defiance, or in reckless disregard, of an announced rule making the federal right specific and definite. *United States* v. *Williams*, 341 U. S. 70, 93–95 (opinion of DOUGLAS, J.); *Screws* v. *United States*, 325 U. S. 91, 101–107 (opinion of DOUGLAS, J.) (involving the predecessor to

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[11] Mr. Justice Rutledge in *Screws* v. *United States*, 325 U. S., at 130.

[12] *Ante*, pp. 7–8. See generally, *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 342; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412–413; *United States* v. *Ragen*, 314 U. S. 513, 524; *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

18 U. S. C. § 242). Since this case reaches us on the pleadings, there is no occasion to decide now whether the Government will be able on trial to sustain the burden of proving the requisite specific intent *vis-à-vis* the right to travel freely from State to State or the right to equal utilization of state facilities. Compare *James* v. *United States*, 366 U. S. 213, 221–222 (opinion of WARREN, C. J.). In any event, we may well agree that the necessity to discharge that burden can imperil the effectiveness of § 241 where, as is often the case, the pertinent constitutional right must be implied from a grant of congressional power or a prohibition upon the exercise of governmental power. But since the limitation on the statute's effectiveness derives from Congress' failure to define—with any measure of specificity—the rights encompassed, the remedy is for Congress to write a law without this defect. To paraphrase my Brother DOUGLAS' observation in *Screws* v. *United States*, 325 U. S., at 105, addressed to a companion statute with the same shortcoming, if Congress desires to give the statute more definite scope, it may find ways of doing so.